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FOREIGN SERVICE DESPATCH

FROM : USPOLAD, Tokyo

1446
DESP. NO.

TO : THE DEPARTMENT OF STATE, WASHINGTON.

April 23, 1952
DATE:

REF : Misdes 1331, March 27, and Dept's A-677, April 11, 1952

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3/19/82

SUBJECT: Informal Discussions on FCN Treaty

The comments contained in the Department's airgram under reference are appreciated by the Mission and will be most helpful during the review meetings to be held with the Japanese representatives at the conclusion of the present informal discussions on the FCN Treaty. The point raised in connection with Article II, paragraph 1 (a), will be clarified during the review meetings.

With reference to the Japanese suggestion that the phrase "accused of crime" added to Article III, paragraph 2, it should be noted that this point is under study by the Japanese representatives and may not be raised again. The Mission agrees that the introduction of this concept would serve no useful purpose and believes that it would be so interpreted by the Japanese as to free them of the obligation of notification in cases of "administrative custody" and detention pending accusation of crime, which may be for as long as 21 days.

There are enclosed for the Department's further comment copies of memoranda of conversation on the third (February 29) and fifth (March 7) meetings on the FCN Treaty. The Japanese have not yet presented their suggested revisions to the memorandum covering the fourth meeting (March 4), at which Article VII was discussed.

The Japanese suggestions and proposals raised at the third meeting (Enclosure No. 1) and the fifth meeting (Enclosure No. 2) are summarized below for the Department's convenience:

1. The suggested use of "bodies" or "boards" in place of "tribunals" in the phrase "administrative tribunals and agencies" in Article V, paragraph 1 (Enclosure 1, page 2).

2. The suggested addition of the clause "as long as it is not contrary to public order and good morals" in Article V, paragraph 2 (Enclosure 1, page 2) with reference to the enforcement of arbitration awards.

3. The proposed inclusion of the "national and most-favored-nation treatment" concept in Article VI, paragraph 1 (Enclosure 1, page 4).

4. The proposal that "shall not be subject to molestation or to entry without just cause" be amended to read "shall not be subject to unlawful entry or molestation" in Article VI, paragraph 2 (Enclosure 1, page 5). (Note: Department previously

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Office of the United States Political
Adviser for Japan,
Tokyo.

MEMORANDUM OF CONVERSATION

Subject: Informa Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Morio YUKAWA, Director, Economic Affairs Bureau
Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic Affairs, Bureau
Mr. Kay MIYA AWA, Secretary, First Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the United States Political Adviser, Tokyo, Japan

Date: February 29, 1952, Friday. THIRD INFORMAL MEETING

ARTICLE V

Mr. Otabe opened the third informal meeting by requesting the interpretation of the phrase "administrative tribunals and agencies" as used in Article V, paragraph 1.

Mr. Bassin stated that the use of the word "tribunal" does not imply the existence of administrative courts independent of the regular judiciary, where the same do not exist in a country, although it is broad enough obviously to cover them if and when they do exist.

In reply to a question raised by the Japanese for illustrations of "administrative tribunals" in the United States, Mr. Bassin cited the Federal Communications Commission, Federal Trade Commission, and the Secretary of Agriculture, whose functions are often described as "quasi-legislative" or "quasi-judicial". The precise extent to which their exercise of these functions is reviewable by the courts may vary, but all are subject to the rule of law and all must comply with procedures, limitations and standards prescribed by statue;

all are at least answerable to the courts for strict fulfillment of the requirements of the Constitution and of the statutes under which they operate; and none may adjudge crimes or impose criminal penalties, this being the prerogative of the judicial courts alone. Mr. Bassin expressed the view that because such administrative entities have now come profoundly to control and influence economic life, it is important to an alien that he enjoy the same right of access to them as a citizen, with reference to protecting and furthering his lawful rights and interests.

Mr. Bassin added that since the phrase "tribunals and agencies" has become standard in United States treaty practice, the American side would prefer not to delete one of the words, leaving the other standing alone, lest it be inferred that the intent was to narrow the scope of the provision. He further stated that if the word continued to trouble the Japanese, perhaps it would be possible to find some synonym for the whole phrase, or a substitute for the word "tribunals" such as "bodies" or "boards". If the problem is merely one of translation, he suggested leaving the term as it is in English but making a free translation into Japanese.

Mr. Otabe asked if Article V, paragraph 1 contemplated "extraordinary tribunals" whose establishment is prohibited by the Japanese Constitution (Article 76).

Mr. Bassin replied that Article V, paragraph 1 [redacted] did not refer to extraordinary tribunals" mentioned in the Japanese constitution but rather to "administrative tribunals" as had been previously indicated.

Mr. Otabe stated that this explanation was satisfactory in substance and the Foreign Office could translate the phrase "administrative tribunals and agencies" into Japanese so as to clarify that these were "administrative agencies" and not "extraordinary tribunals of justice". He added that the Japanese side would consider further whether to suggest the substitution of some synonym such as "bodies" or "boards" for the term "administrative tribunals", or to leave the latter unchanged and treat it as a mere matter of translation.

Mr. Yukawa suggested that a provision be included in Article V, paragraph 2 for "the mutual guarantee of the enforcement of an arbitration award by the parties as long as it is not contrary to public order and good morals" of the parties concerned. He indicated that the FCN Treaty between the United States and Greece was the basis for his suggestion.

Mr. Bassin replied that he did not believe the suggestion concerning "public order and morals" would serve a useful purpose. He pointed out that the provision contained in the standard draft left each country free to recognize and enforce awards, except with respect to two factors, namely, the nationality of the arbiters and the situs of the arbitration. Mr. Bassin said that under this provision each country is at liberty to apply such generally applicable commercial arbitration policy as it deems necessary. He stated that the treaty would not interfere if the local law refused to enforce an award, whether foreign or domestic, on the grounds that it was incompatible with "public order